



Constituting Status: An Analysis of the Operation of Status in Perry v. Schwarzenegger

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Note

CONSTITUTING STATUS: AN ANALYSIS OF THE
OPERATION OF STATUS IN PERRY V. SCHWARZENEGGER

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Introduction

The recent Ninth Circuit decision in *Perry v. Schwarzenegger*¹ marked a pivotal step forward for the gay rights movement. The decision is the first time a federal court has held that there is a right to same-sex marriage under the United States Constitution. Applying strict scrutiny,² Judge Vaughn Walker found that Proposition 8's ban on same-sex marriage violated both substantive due process³ and equal protection (on the basis of sex and sexual orientation).⁴ While the constitutional merits of this decision are of great interest, I will leave such analysis to other scholars.⁵ Instead, I believe much can be gained by looking beneath the legal logic of the ruling, to the ideological paradigms that operate below the surface. By ideological paradigms, I do not mean merely the personal opinions of *59 Judge Walker, but the larger societal attitudes and assumptions that manifest themselves within the text. Through a close reading of the opinion, I will examine the ways in which these ideologies interact and converge in often unexpected ways. In particular, I will track the ideological strands inherent in the concept of "status" and the ways in which that single word functions as the driving force behind the entire opinion.

Within the text of *Perry*, the word "status" is overloaded with ideological meanings, signifying at least three different concepts. First, status is drawn from classical legal theory as one-half of the status/contract dyad. Second, status plays a role in the politics of queer identity within the status/conduct dyad. In describing the significance of same-sex marriage, *Perry* draws on both of these paradigms and imbues the status half of both dyads with a sense of normative desirability, even superiority. As the opinion reaches this normative conclusion, it engages with the third meaning of status: status as rank or social status. The interactions between and among these different constructions of status undergird the legal conclusions and ultimately create value in status qua status. Within this discourse, status (rank) is correlated with inclusion in the status half of each dyad--social status is achieved once both marriage and sexual orientation are constituted as falling within the status half of their respective dyads.

In discussing the status/contract and status/conduct dyads, I do not mean to imply that these pairs are natural or innate opposites. Nor do I intend to convey that either of the terms is normatively superior in comparison to the other. Both dyads are cultural constructs, convenient ideological lenses with which to view and classify the world. My goal in this paper is merely to show the ways in which *Perry* builds upon these ideologies of status and enshrines status in all its forms. In Part I, I will discuss the status/contract dyad and the way in which the opinion moves counter to the dominant narrative that law (and marriage in particular) is moving away from status to contract. Part II contains an analysis of status as rank and the way in which legal status is closely entwined with conceptions of rank and power. In Part III, I turn to the status/conduct dyad and the way in which *Perry* disclaims constructivism in favor of a theory of weak essentialism. I conclude by arguing that these moves toward status, while counter to popular ideological narratives, are instrumental to the ultimate holding that Proposition 8 is unconstitutional on both substantive due process and equal protection grounds.

***60 Part I--The Status/Contract Dyad**

The status/contract distinction emerged from classical legal theory in the 19th century,⁶ but this meaning of status has its roots in even older social structures. In Blackstone's Commentaries, he discusses four classic status pairs: master/servant, husband/wife, parent/child, and guardian/ward.⁷ The individuals within these pairs existed in status relationships that marked them as "highly particular social beings" whose rights and duties with respect to those around them were defined by their status classifications.⁸ In 19th century legal thought, the concept of status was further refined, and status was formulated as the opposite of contract. Status relationships were constituted as prescribed packages of rights and obligations, while contract relationships were constructed as bargained-for interactions, reflecting the free will of the individual contracting parties.⁹

The traditional historical narrative posits that, with the advent of the modern era, status ceased to be the dominant relational form and was gradually replaced by contract.¹⁰ As Henry Sumner Maine famously explained, "the movement of the progressive societies has hitherto been a movement from Status to Contract."¹¹ For Maine, this movement was characterized by "the gradual dissolution of family dependency, and the growth of individual obligation in its place."¹² There was a normative valence in this movement from status to contract--status was associated with less developed, foreign societies,¹³ while contract was associated with free will and individualism.¹⁴ While numerous scholars have taken issue *61 with Maine's account of history, the concept of status progressing forward to contract still maintains a strong hold on the societal imagination.¹⁵

Despite the tendency to see history as a progressive march towards contract, marriage itself occupies a problematic place within the advancement from status to contract. Maine himself struggled with the classification of marriage when he explained that "[t]he status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract."¹⁶ Women were only free from status when they existed outside of a marriage relationship. Despite Maine's desire to show that Western society had ascended to a purely contractual level, he was forced to concede that married women were prohibited from contract and thus existed in a status relationship within the family.¹⁷

Part of Maine's theoretical problem stemmed from the institution of coverture. Today, with the end of coverture (and the advent of no-fault divorce and pre-nuptial agreements), it is easier to view married women as part of a contractual relationship and the institution of marriage as contractual, rather than status-based.¹⁸ This interpretation is a far cry from that of 19th century jurists, who were adamant in their classification of marriage as status.¹⁹ The Supreme Court in *Maynard v. Hill*²⁰ expounded *62 upon this distinction when it determined that marriage was a status-based, not contractual, institution.²¹ The Court explained that

[a]t common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement as of public ordination. In every enlightened government it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.²²

The progressive narrative of marriage holds that our society has moved far from the Maynard vision of unchanging status to a fluid, contract-based regime.²³ In reality, however, marriage is better described as a mixture of *63 status and contract, rather than a clearly defined movement from one state to the other. As Janet Halley argues, "marriage-as-contract is not the opposite of marriage-as-status; these two visions of marriage-- perpetually linked to one another as alternatives--are the way we understand

our constant, irresolvable ambivalence about individualism and altruism in this domain.”²⁴ The pure, platonic categories of status and contract cannot adequately describe the marriage institution in which spouses can bargain for specific rights, yet are still bound by unalienable duties.²⁵ Indeed, even the categories of status and contract are not true dyadic opposites.²⁶ The two categories intertwine and overlap, rendering the traditional status/contract dyad highly problematic both as a historical description and as distinct legal concepts.²⁷ Despite this instability, I use the status/contract *64 framework as the basis for my analysis of same-sex marriage because of the profound ideological impact this theory has had on legal thinking about the institution of marriage.²⁸

In the context of Perry and the debate over same-sex marriage, participants on both sides of the issue have emphasized the status, rather than contractual, aspects of marriage. According to Halley, “the debate over same-sex marriage has intensified and broadened a social commitment to think of marriage as status.”²⁹ *Goodridge v. Department of Public Health*³⁰ offers a clear illustration of this theoretical move because the dissent and majority converge in their descriptions of marriage as a status institution.³¹ In finding that there is a right to same-sex marriage under the Massachusetts Constitution, the majority explains that “[m]arriage is not a mere contract between two parties but a legal status from which certain rights and obligations arise.”³² The dissent similarly emphasizes the status-not-contract nature of marriage: “Marriage has not been merely a contractual arrangement for legally defining the private relationship between two individuals Rather, on an institutional level, marriage is the ‘very basis of the whole fabric of civilized society’”³³ While the majority and dissent disagree as to whether same-sex couples can participate in marriage, they both view the social institution of marriage as a status relationship.³⁴ The majority may be progressive in expanding marriage to include same-sex couples, but it is conservative in defining marriage as a status, which “is a ‘social institution of the highest importance.’”³⁵

The Perry decision differs from *Goodridge* in its treatment of marriage insofar as Walker purports to operate within the status-to-contract progressive narrative. Walker carefully rehearses the accepted historical *65 advancement of family law, presenting the narrative as legal findings of fact.³⁶ He describes the ways in which the various restrictions on marriage have been removed until the vestiges of status were stripped from the institution, leaving it as a contract between two equal individuals.³⁷ He finds, in Fact 23, that slaves were forbidden from marrying because they lacked the ability to consent to a contract;³⁸ Fact 25 discusses the end of miscegenation laws;³⁹ Fact 26 describes the institution of coverture;⁴⁰ Fact 27 finds that “[m]arriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines”;⁴¹ Fact 28 declares that “no-fault divorce . . . allowed spouses to define their own roles within a marriage”;⁴² and Fact 33(c) triumphantly declares that “[t]he removal of gender inequality in marriage is now complete.”⁴³ With each step forward, marriage is stripped of some of its status restrictions, increasingly approaching a state of pure contract. This historical progression seems to resolve itself by establishing marriage as a purely contractual institution, marked “as a realm of liberty for intimacy and free decision making by the parties.”⁴⁴

Given this grand historical progression, one expects Walker to present a purely contractual vision of marriage. However, he breaks with the progressive narrative by emphasizing the status aspects of the marriage institution. The status nature of marriage first emerges in the discussion of marriage as compared to civil unions and domestic partnerships. Walker draws on the testimony of the plaintiffs to depict civil unions as a starkly contractual relationship.⁴⁵ According to Perry, a “domestic partnership [is] an agreement; it is not the same as marriage.”⁴⁶ Perry’s partner, Stier, opined that “domestic partnership feels like a legal agreement between two parties that spells out responsibilities and duties. Nothing about domestic *66 partnership indicates the love and commitment that are inherent in marriage.”⁴⁷ If marriage were truly a contractual relationship, as the progressive historical narrative would lead us to conclude, then there would be no difference between a marriage and the “legal agreement” of a domestic partnership. Nevertheless, the plaintiffs, and Walker, insist that the two institutions are fundamentally distinct.

By rhetorically placing marriage in opposition to the contractual institution of domestic partnership, the opinion re-situates marriage as the opposite of contract, thereby returning marriage to the realm of status.⁴⁸

In contrast to the dry, contractualism of a domestic partnership, marriage is envisioned as a status relationship that is responsible for the very ordering of society. As Walker describes, [m]arriage requires two parties to give their free consent to form a relationship, which then forms the foundation of a household. The spouses must consent to support each other and any dependents. The state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace.⁴⁹

The focus on unchangeable rights and obligations (which form the bedrock of a stable society) echoes the Maynard court's description of marriage and its classification as a legal status.⁵⁰ Walker goes on to posit that despite the historical progress of marriage, the essence of the institution (its status nature) has remained unchanged.⁵¹ He concludes that "[t]he evidence shows that the movement of marriage away from a gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage."⁵² Walker intimates that there is something inherent and unchangeable in marriage that has remained consistent over history.⁵³ This statement begs the question: if the changes surrounding marriage have not been actual changes in marriage, what is the core unchanging nature of the marriage institution? I propose that, for Walker, this unchanging core is the status nature of marriage, the unalterable rights and obligations that define the spouses' roles in society. In Walker's words,

*67 [p]laintiffs seek to have the state recognize their committed relationships, and plaintiffs' relationships are consistent with the core of the history, tradition and practice of marriage in the United States. Perry and Stier seek to be spouses; they seek the mutual obligation and honor that attend marriage. Zarrillo and Katami seek recognition from the state that their union is "a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred."⁵⁴

One of the clearest examples of marriage and domestic partnerships aligned at opposite ends of the status/contract dyad is Walker's discussion of a 2004 change in California's domestic partnership law.⁵⁵ As psychologist Gregory Herek testified, In 2004, California enacted legislation that increased the benefits and responsibilities associated with domestic partnership, which became effective in 2005. In the second half of 2004, the California Secretary of State mailed a letter to all registered domestic partners advising them of the changes and telling recipients to consider whether to dissolve their partnership.⁵⁶

Herek found the letter significant because it represented the way in which domestic partnerships can be readily entered and exited, as if they were merely contractual business relationships. He contrasted the transitory contractualism of domestic partnerships with the stable status of marriage, continuing,

[I] find[] it difficult to imagine that if there were changes in tax laws that were going to affect married couples, that you would have the state government sending letters to people suggesting that they consider whether or not they want to get divorced before this new law goes into effect. I think that--that letter just illustrates the way in which domestic partnerships are viewed differently than marriage.⁵⁷

*68 The key for Herek was the psychological ease with which domestic partnerships can be dissolved, as opposed to marriage.⁵⁸ By suggesting that domestic partners would readily sever their legal ties in order to avoid the burden of changes in the law, the state was sending a message that domestic partnerships are contracts to be renegotiated or terminated whenever external legal conditions change.⁵⁹ As Herek notes, it would be considered bizarre if couples treated marriage in the same way because marriage is not viewed in the same contractual light.⁶⁰

By focusing on Herek's example in his opinion, Walker inscribes the status/contract distinction into the law of the case, positioning marriage as status and domestic partnership as contract. In doing so, Walker is re-inscribing value judgments that rank marriage (status) as superior to domestic partnerships (contract). I will attempt to explain the origins of this valuation and the ways in which hierarchy is built into the status/contract dyad in the following section.

Part II--Status as Rank

The term "status" takes on a second connotation in the discussion of marriage and domestic partnership--namely, status understood as rank or social standing.⁶¹ Implicit in the legal comparisons between the two institutions is a judgment that one institution (marriage) is superior to the other (domestic partnership). In this section, I will trace the origins of this judgment and dismantle the way in which these two meanings of status intersect.

The use of status as rank in the marriage context is not unique to Perry; this meaning can be found in other cases discussing the issue of same-sex marriage. Goodridge touched briefly on the issue of status/rank when the majority noted "[m]arriage also bestows enormous private and social advantages on those who choose to marry."⁶² While the court goes on to list the specific legal advantages of marriage, the inclusion of "social advantages" points to the high-ranking position that marriage holds in *69 society.⁶³ By this, I mean not just that people care about marriage as an abstract institution, but that married couples are afforded a degree of social standing and rank by virtue of their marriage. Goodridge's companion case, *In re Opinions of the Justices to the Senate*, spoke more directly to the social status inherent in marriage:

The bill's [providing civil unions for same-sex partners] absolute prohibition of the use of the word "marriage" by "spouses" who are the same sex is more than semantic. The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual couples to second-class status.⁶⁴

This opinion asserts that couples who are relegated to civil unions are living in a "second-class," albeit contractual relationship, whereas married couples are given the social status of existing within a status relationship.⁶⁵ Put in these terms, the fight over same-sex marriage is recast as a struggle to move queer individuals from second-class to first-class status, by granting them access to the institution of marriage.

This language of first- and second-class status is frequently invoked within the Perry decision. As psychologist Letitia Peplau testified, marriage is "the first class kind of relationship in this country . . . the status of relationship[] that this society most values, most esteems, considers the most legitimate and the most appropriate."⁶⁶ Similarly, economist Lee Badgett testified that society sees domestic partnerships as "second class status."⁶⁷ Walker incorporates this reasoning into his findings of fact, declaring "domestic partnership does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships."⁶⁸ Domestic partnerships, precisely because they denote a lower social status, are less desirable because they are "not something that is necessarily understood or recognized by other people in [one's own] environment."⁶⁹

*70 On some level, it seems natural to classify marriage as superior and domestic partnerships as inferior or second-class, and it is the very ease of this classification that I wish to examine. If, as Maine proposed, enlightened societies advance from status to contract,⁷⁰ why should the status relationship (marriage) be more socially desirable? Is it not true that the more purely contractual relationship should be valued precisely because it reflects the free will and reason of the individual actors? I propose that part of the social preference at work here is due to the history of the status relationship itself. Consider the classic status pairs from Blackstone: king/commoner, master/slave, husband/wife.⁷¹ Not only do these status relationships define different

bundles of rights and obligations between parties, they are also designations of rank or social class. In each pairing, one-half of the dyad occupies a socially superior position in relation to the other. The king is ranked above the commoner, the master above the slave, and the husband above the wife.⁷²

The connection between status as a legal package of rights and obligations and status as rank is connected both etymologically and historically: the same word designates both meanings, and the classic status relationships were crucial designators of standing in society.⁷³ According to the Oxford English Dictionary, status is defined as “[t]he legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations; condition in respect, e.g., of liberty or servitude, marriage or celibacy, infancy or majority.”⁷⁴ A second definition pertains more closely to rank: “[p]osition or standing in society, a profession, and the like.”⁷⁵ While these two definitions can be categorized as legal and social, respectively, it is impossible to fully sever the one from the other. The legal position is a *71 function of the position in society (whether liberty or servitude, marriage or celibacy) and the social position is dependent on legal rights and entitlements. This reflexive relationship between legal status and social status causes us to implicitly rank one position as higher than the other when faced with both halves of a status relationship.

The connection between legal status and rank means that we are accustomed to seeing status pairs and creating a hierarchy between the two positions. When faced with the pair of marriage/domestic partnership, we comfortably ascribe superiority to the one and inferiority to the other. However, marriage and domestic partnership, while two related institutions, do not make up a true status relationship like king/commoner or master/slave. In a traditional status dyad, both sides of the pair have rights and obligations to each other, and it is that particular bundle of responsibilities that defines the nature of the relationship. Marriage and domestic partnership have no rights or obligations to each other as institutions; rather they themselves designate rights and obligations for the couples within their purview. A husband can have rights and obligations to a wife, but marriage, as an abstract institution, cannot have rights and obligations to another institution, like domestic partnership. Halley suggests that we tend to see marriage in relation to the state of singleness, proposing that married/single could function as a status dyad.⁷⁶ Nevertheless, as Halley points out, there is no mutual obligation between married people and single people.⁷⁷ While the individuals inside of marriage may exist within a status, and marriage as an institution can be a status, marriage itself does not exist in a status relationship with another legal institution.

Despite the fact that marriage/domestic partnership is a false status dyad, the deep-rooted concept of status relationships and the overloading of the status term causes us to project rankings onto these abstract categories. The words labeling the two institutions take on status attributes, and we see them as existing in a hierarchical relationship with each other. As Suzanne Kim describes, “[t]oday’s discussion of legal prohibition of same-sex marriage rests on the belief that language, in the form of names and labels, is deeply meaningful from a status perspective.”⁷⁸ Kim argues that the language we use to discuss and differentiate marriage and domestic *72 partnerships actually reifies and (re)creates the hierarchical distinction; “language practices (for example, selecting different terminology), particularly when used by the state, have direct status consequences.”⁷⁹ Once these terms have been imbued with markers of social status, “[a] state-enforced difference in terminology such as that between ‘marriage’ and ‘civil union’ affects same-sex couples’ status because it both reflects and reinforces their marginalized status relative to opposite-sex couples.”⁸⁰ According to Kim, merely having two separate terms for the same thing causes us to rank those terms and create social hierarchy.⁸¹

While I agree with Kim that the linguistic pairing of marriage and domestic partnership is to some degree responsible for the hierarchical ranking of the two institutions, I think there are other forces at work. In addition to the structural practice of ranking the two halves of a status pair, I would argue that the ranking of marriage and domestic partnership reflects a societal preference for status over contract. In Perry, time and again, the status qualities of marriage are emphasized and valued as desirable. For example, Fact 60(b) points out that

[m]any Dutch couples saw marriage as better because it had an additional social meaning that registered partnership, as a recent political invention, lacked . . . In some places, the cultural and political trappings of statuses that are not marriage send a very clear message of difference and inferiority to gay and lesbian couples.⁸²

The thing that makes marriage “better” than a domestic partnership is its “cultural and political trappings”;⁸³ in other words, the status nature of marriage. Culturally, marriage is critical in defining a person's role in society because it is viewed as a status relationship, a fundamental relationship that establishes a person's social role, rights, and responsibilities. Domestic partnership is seen as a contract that does not carry with it the same embedded social message. The status “trappings” of marriage then become the sought-after marker of social superiority. This preference for status (marriage) over contract (domestic partnership) harkens back to *Maynard v. Hill*, when status relationships were held out as the pinnacle of social achievement.⁸⁴ Status relationships are described as *73 simply more desirable than and superior to contractual ones, and to deny a person access to legal status is to relegate him or her to an inferior social status.

While it may be normatively problematic to claim as legal fact that marriage is socially superior to domestic partnership, I contend that such a ranking was crucial to Walker's finding that Proposition 8 was a violation of substantive due process. The hierarchical distinction is necessary because proponents of Proposition 8 argued that same-sex couples were not actually denied access to the fundamental right of marriage⁸⁵ due to the fact that same-sex couples were provided with the institution of domestic partnership as an equal substitute.⁸⁶ In order to find a violation of substantive due process, the court had to hold that domestic partnership, while legally equal to marriage, was not an adequate replacement for it. The hierarchical ranking of the two institutions becomes the lynch pin in the due process argument because it is the only means of distinguishing the otherwise legally identical⁸⁷ institutions. Walker relies on social status as a way of distinguishing domestic partnership from marriage:

The evidence shows that domestic partnerships do not fulfill California's due process obligation to plaintiffs for two reasons. First, domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage. Second, domestic partnerships were created specifically so that California could offer same-sex couples rights and benefits while explicitly withholding marriage from same-sex couples.⁸⁸

The “social meaning” that domestic partnerships fail to provide is the social superiority of a status relationship. Walker concludes that domestic partnership cannot be an adequate substitute for marriage because *74 “marriage is a culturally superior status compared to a domestic partnership.”⁸⁹ An “inferior institution,” like domestic partnership, is not enough to meet the state's “due process obligation to allow plaintiffs to marry.”⁹⁰ The language of the opinion reinforces and re-enacts the ranking of the two institutions in order to engage in this due process analysis.⁹¹ In extending the right to marry to same-sex couples, Perry entrenches marriage's position as the most desirable and superior social institution.

Part III--The Status/Conduct Dyad

A third meaning of status that lurks in the background of Perry is status as part of the status/conduct dyad. This variation of status is most commonly used in the debate surrounding Don't Ask, Don't Tell,⁹² which was ostensibly established to prevent homosexual conduct, not homosexual status, in the military.⁹³ Used in this context, status is defined as identity or essence, in contrast to conduct or actions. There is only one explicit allusion to this kind of status in Perry. In his discussion of the Equal Protection Clause, Walker explains, “[h]omosexual conduct and identity together define what it means to be gay or lesbian,”⁹⁴ and he cites to *Christian Legal Society v. Martinez*⁹⁵ for the proposition that Supreme Court “decisions have declined to distinguish between status and conduct in [the context of sexual orientation].”⁹⁶ While this is the only mention of status as

sexual identity in Perry, I contend that this form of status is present throughout the opinion and is integral to creating a particular vision of homosexuality.

Many of Walker's findings of fact are devoted to establishing the exact nature of sexual orientation. Fact 43 avers,

***75** Sexual orientation refers to an enduring pattern of sexual, affectional or romantic desires for and attractions to men, women, or both sexes. An individual's sexual orientation can be expressed through self-identification, behavior or attraction. The vast majority of people are consistent in self-identification, behavior and attraction throughout their adult lives.⁹⁷

While Walker begins by describing sexual orientation in terms of conduct (the feelings and desires expressed and acted upon), he quickly switches to terms of status and identity (like "consistent in self-identification").⁹⁸ Homosexual status is described as something inherent and unchanging,⁹⁹ essential to a person's definition of self. As Fact 44 concludes, "Sexual orientation is commonly discussed as a characteristic of the individual. Sexual orientation is fundamental to a person's identity."¹⁰⁰ In addition, many of the factual findings are devoted to refuting the proposition that sexual orientation is changeable or socially constructed. For example, Walker cites as fact Ilan Meyer's testimony that "[s]exual orientation is perceived as 'a core thing about who you are.' People say: 'This is who I am. [I]t is a central identity that is important.'" ¹⁰¹ Walker also stresses the plaintiffs' assertions that they were "born" gay and that their orientations are fixed and unchanging.¹⁰² The implication of this testimony is that homosexuality is primarily status-based; it is an inborn characteristic, and an individual's conduct will naturally comport with this innate status.¹⁰³

The vision of homosexuality put forth in Perry mirrors the essentialist theory of sexuality, which posits that sexuality is biologically created, rather than socially or culturally constructed. As Janet Halley describes the two positions, an essentialist view of homosexual orientation claims that it is a deep-rooted, fixed, and intrinsic feature of individuals. This essentialist view assumes that homosexual orientation is determined (by nature or nurture), not chosen . . . ***76** The constructivist view of homosexual orientation claims that it is a contingent, socially malleable trait that arises in a person as she manages her world, its meanings, and her desires.¹⁰⁴

The essentialist view is closely linked to the idea of status, the idea that sexual orientation is something innate inside the self that does not depend on social or cultural interaction for its creation.¹⁰⁵ The essentialist/constructivist divide is similar to the status/conduct dyad in that essentialism posits that sexual orientation is part of identity, an essential component of a person that cannot be changed. In this sense, sexual identity is status: who a person is, as opposed to what a person does (conduct). Walker's findings of fact lean heavily toward the essentialist view. While Walker does not commit to strong essentialism,¹⁰⁶ he decidedly rejects the proponents' contentions that sexual orientation is a social construction (i.e. the constructivist view). For example, Fact 46 establishes that "[i]ndividuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."¹⁰⁷ Social constructivism is briefly considered and dismissed when Walker accepts as fact Herek's disapproval of the theory.¹⁰⁸

The debate between constructivism and essentialism has important implications for equal protection litigation. One of the concerns in an equal protection case is the ability to categorize the disadvantaged group as a ***77** legally cognizable class.¹⁰⁹ As Suzanne Goldberg explains, "In the equal protection context, this means that a plaintiff must show that the government has drawn an impermissible, injurious classification based on a trait he or she possesses."¹¹⁰ One defense to an equal protection challenge is to assert that the trait does not exist in the first place or that it cannot be used to create a defined class of individuals. The proponents of Proposition 8 launched just such an attack when they asserted "that sexual orientation cannot be defined."¹¹¹

Essentially, the proponents were asserting a constructionist position by arguing that sexual orientation was so changeable and culturally contingent that there was no way to define a class of persons who possessed the trait of “homosexuality.”¹¹²

In an interesting twist, this puts defenders of anti-gay policies in the traditionally liberal theoretical position of social constructivism.¹¹³ In contrast, litigators arguing for gay rights tend to argue that sexual orientation is biological and immutable in order to emphasize the fixed and discrete nature of the disadvantaged group.¹¹⁴ Goldberg contends that judges are more comfortable with the essentialist theory that sexuality is a natural, unchanging fact, because it relieves courts of the responsibility of defining the trait for themselves:

*78 By overtly allowing for the possibility that the meaning and significance of a trait may change over time or vary among individuals, either because society changes or because individuals experience the trait differently, both theories [anti-essentialism and social constructivism] reject the existence of an absolute, fixed trait definition. This position, in turn, affects adjudication of trait-based anti-discrimination claims because it puts front and center the court's role in defining a trait's contours. In contrast, theories such as essentialism that disregard society's role in defining a trait or discount [how] variations among trait-bearers shape a trait's definition leave courts in the seemingly passive position of receiving a trait definition that is mandated or derived from “nature.”¹¹⁵

By framing a trait as already defined by nature, a court can accept the category as ready-made and avoid the criticism of having actively created a new categorization.¹¹⁶ Gay rights lawyers who accept this strategy are then forced to portray sexual orientation as a biologically driven, inherent characteristic, a theory that many find highly problematic.¹¹⁷ Even if gay rights litigators wanted to present a more nuanced, weak constructivist view of sexuality, Goldberg worries that “judicial reluctance to define personal traits may limit the effectiveness of anti-essentialist and social construction arguments in assisting courts to reach accurate, non-simplistic understandings of identity-based discrimination.”¹¹⁸ There is a sense that a simple, biologically based understanding of sexual orientation is necessary in order to establish the existence of a class in an equal protection claim.¹¹⁹

Put in terms of status and conduct, there is a strong presumption that equal protection litigation can only protect gay rights if homosexuality is framed as status, not conduct. Seen as an innate status, homosexuality is an easily definable class that is marked by inherent characteristics possessed by a discrete population. When homosexuality is defined as conduct, however, the bounds of the class are set in flux. Such awkward questions arise as: is a person within this class if he or she performs one same-sex act, or must a person be a repeat player to fit within the bounds? In the context of *Don't Ask, Don't Tell*, Janet Halley writes that *Hardwick* and its *79 progeny “set up a dichotomy: gay plaintiffs would almost certainly lose when courts concluded that discrimination against them was based on disapproval of their sodomitical conduct, and they might well win when courts concluded that discrimination was based ‘merely’ on their status.”¹²⁰ While this distinction is based in part on the fact that, until *Lawrence*, homosexual conduct was a permissible ground for discrimination, the distinction also relies on an essentialist construction of status. This status-based construction is troubling because it focuses too narrowly on the metaphysical essence of an individual and disallows any space for free will or individual action:

[T]he assumption [is] that homosexuality, as a status, pre-exists legal ascription and will remain metaphysically the same whether the law recognizes it or not. This claim--that the law does not make homosexuals and in fact can entirely ignore them--rests on an implicit reification of sexual orientation as a form of personhood. Homosexual orientation is represented as status in the sense that it is a type of personal character that inheres so deeply within a person that it constitutes a pervasive personal essence. Sexual-orientation status on this model is both real and intrinsic to individuals: it is not the nominal product of its apperception or a product of interaction among individuals. Sexual orientation as status is constituted in and as a secret inner core of personhood; thus it is not constituted in relationship, interaction, or representation. And so it has nothing to do with conduct.¹²¹

In accepting the plaintiffs' claim of discrimination based on innate sexual orientation, Walker implicitly defines sexual orientation as status, not conduct. While this led to a legal victory for gay rights, the decision must still be scrutinized as part of the larger legal and theoretical landscape. Perry comes down on the side of essentialism and hints towards a strong biological basis, thereby belying any notion that culture, choice, or conduct play a role in the construction of sexuality. The decision is troubling inasmuch as a court is making authoritative findings of fact about a question that is both widely debated and deeply personal. When equal protection is decided on status grounds, does it foreclose the possibility of protection for individuals who view their acts as freely chosen and not biologically ordained? Going forward, how does this fixation on status affect both the conception of the self and human sexuality and the available protection for individuals who live and view their lives as social constructs?

*80 Conclusion

Throughout this paper, I have traced the ways in which status is referenced and valued throughout the text of *Perry v. Schwarzenegger*.¹²² In each of the three sections, I have discussed the ways in which status was positioned as part of three different pairs, always holding an oppositional place in relation to another concept. Status is constituted as the opposite of contract; it is attached to marriage as hierarchically superior to domestic partnership, and it is contrasted with conduct in the essentialism/constructivism debate. In these three relationships, none of which make up true theoretical dyads, status is consistently framed as an oppositional value, operating in contrast to and in tension with its ideological counterpart. Each time the court is asked to make a choice between the two halves of the dyad, it evinces a strong social and judicial preference for status. The concept is overloaded with different meanings, but all those meanings converge in their desirability and superiority.

Marriage is constituted as a status, not contractual, relationship, and it is this legal status that gives it social status (rank). Social status (or the lack thereof), in turn, allows the court to define domestic partnership as an insufficient substitute for the status of marriage. The status (state) of the plaintiffs as queer is understood in terms of their status (identity or essence) rather than their conduct in order to reify their status (position) as a discrete, disadvantaged class. Status both underlies and motivates the judicial decision; it is invoked as part of the doctrine of due process and equal protection and it operates normatively as a descriptor of social values. I do not contend that the decision self-consciously relies on these status concepts, but rather that the use of status reflects a broader social and cultural trend. The debate over same-sex marriage has reaffirmed the ascendancy of status in every meaning of the term. As I have shown, this return to status can be found in the writings of judges, academics, psychologists, and the broader population.¹²³ It is the incorporation of these many voices into the factual findings of *Perry* that establishes status as a profoundly important and multi-dimensional cultural concept. However, just as *Perry* picks up on social preferences, it also plays a role in shaping the preference itself. The decision memorializes and legitimates these valuations of status, recreating the superiority of status by inscribing it in the legal record.¹²⁴ The judicial findings of fact (that marriage is a status, that marriage has superior status, and that homosexuality is a status) *81 set forth in *Perry* will be used and reused, integrated into the social fabric, gradually becoming markers in yet another chapter in the progressive (or regressive) narrative of status.

Footnotes

^{a1} J.D. Harvard Law School, Class of 2011. Written under the supervision of Professor Janet Halley. This paper is dedicated to Garratt and Liza.

¹ 704 F. Supp. 2d 921 (N.D. Cal. 2010).

² *Id.* at 994 (citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)) ("Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny."). Strict scrutiny is likewise applied to the equal protection claim. *Id.* at 997 ("The trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation.").

- 3 [Id. at 994-95](#) (finding that domestic partnership is not an adequate alternative to the fundamental right of marriage).
- 4 [Id. at 996](#) (“Proposition 8 operates to restrict Perry’s choice of marital partner because of her sex. But Proposition 8 also operates to restrict Perry’s choice of marital partner because of her sexual orientation; her desire to marry another woman arises only because she is a lesbian.”). Walker concludes that these two categories (sex and sexual orientation) are intimately linked: “[T]he court determines that plaintiffs’ equal protection claim is based on sexual orientation, but this claim is equivalent to a claim of discrimination based on sex.” [Id.](#)
- 5 See, e.g., Chase D. Anderson, Note, [A Quest for Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage Review After Perry](#), 60 *Duke L.J.* 1413, 1452 (2011). See generally William N. Eskridge, Jr., [Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?](#), 50 *Washburn L.J.* 1 (2010) (discussing the implications of political powerlessness and political process theory for the Perry litigation); Lawrence Friedman, [Not the Usual Suspects: Suspect Classification Determinations and Same-Sex Marriage Prohibitions](#), 50 *Washburn L.J.* 61 (2010) (supporting the decision of recent judicial opinions in declining to include gays and lesbians as a suspect class); Carey Brennan, Note, [Perry v. Schwarzenegger: A Large Step in the Direction of Marriage Equality in California](#), 20 *Law & Sexuality* 121 (2011) (criticizing Walker’s finding that Proposition 8 discriminated on the basis of sex in addition to sexual orientation).
- 6 See generally Janet Halley, [What is Family Law?: A Genealogy Part I](#), 23 *Yale J.L. & Human.* 1 (2010) [hereinafter Halley, *What is Family Law?*] for a detailed explanation of how and why the concept of marriage as status was adopted in 19th century America.
- 7 William Blackstone, *Commentaries on the Laws of England: Of the Rights of Persons* (Oxford, Clarendon Press 1765), available at <http://heinonline.org/HOL/Index?index=beal/blakston&collection=beal>. The table of contents for “Of the Rights of Persons” lists chapters covering the rights “Of Master and Servant,” “Of Husband and Wife,” “Of Parent and Child,” and “Of Guardian and Ward.”
- 8 Halley, *What is Family Law?*, *supra* note 6, at 7-8.
- 9 [Id.](#) at 11.
- 10 [Id.](#) at 12.
- 11 Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* 174 (Frederick Pollock ed., John Murray 1912) (1861).
- 12 [Id.](#) at 172.
- 13 Maine describes status as “the ancient organization” that predominated at “one terminus of history.” [Id.](#) Status is viewed as something pre-modern and primitive that only exists in backwards, lesser-developed civilizations. As Maine explains, “whatever its pace, the change [from status to contract] has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source.” [Id.](#) Maine’s theory is deeply intertwined with notions of colonialist superiority; he juxtaposes the progress of Western Europe against the archaic ways of foreigners. [Id.](#) at 173 (“In Western Europe the progress achieved in this direction has been considerable.”); see also [id.](#) at 173 (“So too the status of the Son under Power has no true place in the law of modern European societies.”).
- 14 Maine, *supra* note 11, at 172-73 (describing contract as “a phase of the social order in which all these relations arise from the free agreement of Individuals”).
- 15 See, e.g., Reva Siegel, [Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action](#), 49 *Stan. L. Rev.* 1111, 1115 (1997) (“It is conventionally asserted that status law of this sort died out with the growth of capitalism and the spread of liberal conceptions of citizenship. Various accounts of modernization posit a movement during the nineteenth century from ‘status to contract,’ resulting in the break up of status hierarchies and the redefinition of juridical persons as equal in capacity and entitlement. These traditional assumptions about the form and developmental trajectory of status law do not bear up well under historical scrutiny.”).
- 16 Maine, *supra* note 11, at 173. Maine concludes that the people in Western society are relegated to status relationships only when “they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement in Contract.” [Id.](#) While Maine does not explicitly place women within this category (he mentions children, orphans, and lunatics as examples of those “regulated by the Law of Persons”), the married woman’s confinement to status necessarily constitutes

her as intellectually unsound. *Id.* The problem with Maine's theory is that women are evidently capable of informed decision-making up until the time they are married (which is itself accomplished through a contract), but after marriage they lose the ability to contract (and, by Maine's logic) the ability to reason.

17 *Id.*

18 Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 *Unbound* 1, 15 (2010) [hereinafter Halley, *Behind the Law*] (“For many contemporary assessments of family law, Maine is exactly right: the onset of contractual freedom between spouses is seen as necessary for marriage to be free and equal.”).

19 Joel Prentiss Bishop first introduced this distinction into American law in 1852. *Id.* at 2 (citing Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits* (1852)). See generally Halley, *What is Family Law?*, *supra* note 6, for a discussion of the way in which the concept of marriage as status was incorporated into the English and American legal systems.

20 125 U.S. 190 (1888).

21 *Id.* at 210-11 (Marriage “is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”). Ironically, the Court in *Maynard* extolled the virtues of marriage so that it could effectuate a divorce between husband and wife David and Lydia Maynard. *Id.* at 209. The Court determined that marriage was not a contract, and it was therefore the legitimate subject of legislative activity, unimpeded by the Contract Clause. *Id.* at 210 (“[W]e are clear that marriage is not a contract within the meaning of the prohibition [contained in the Contract Clause].”).

22 *Id.* at 213 (quoting *Noel v. Ewing*, 9 *Ind.* 37, 49-50 (*Ind.* 1857)).

23 Halley, *Behind the Law*, *supra* note 18, at 15 (“We frequently speak of this tension as involving a temporal narrative—a shift of marriage from status to contract—understood either as progress or decline.”). This understanding of marriage as a chronological progression has its roots in 19th century legal theorists, such as Henry Sumner Maine. See *id.* at 14 (“This framework derives directly from Sir Henry Sumner Maine’s famous observation that the very essence of modernity involves progress from status to contract....”). For an example of an optimistic take on the rise of contract, see Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 *Colum. J. Gender & L.* 287, 363 (2010) (“[R]elying on Henry Maine, it [this article] suggests that contract, generally, can improve on the status-based reasoning that brought us miscegenation laws, The Mormon Coon, and DOMA. A contractual view of marriage would allow adults to consent to different types of marriage.”). For a negative view of the progressive contractualization of marriage, see Jennifer Wiggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 *B.C. L. Rev.* 265, 277-78 (2000) (“One of the ways in which family and marriage law have become more individual-oriented, as many have observed, is through the gradual move from status to contract. Glendon, Schneider, and Hafen all find problems with the introduction of a contractual approach to family law.”). Wiggins then cites the scholarship of those three individuals. *Id.* Hafen asserts that the addition of a contractual element degrades personal investment in familial relationships. See Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 *B.Y.U. L. Rev.* 1, 25-26, 38 (1991). In regards to prenuptial agreements, Glendon notes that they “are nearly always used to insulate the property of the economically stronger spouse, who in most cases will have the better bargaining position.” Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* 139 (1989). Finally, Schneider states “contract law is primarily seen as a way of relieving people of obligations the law and social norms have historically embodied.” Carl. E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 *Utah L. Rev.* 503, 532 (1994).

24 Halley, *Behind the Law*, *supra* note 18, at 16.

25 For an example of the tension between status and contract in modern family law, see *Borelli v. Brusseau*, 16 *Cal. Rptr. 2d* 16, 20 (*Cal. Ct. App.* 1993) (holding that a wife cannot contract with her husband regarding her marital duty to care for him while sick).

26 For example, Max Weber discussed the concept of a “status contract,” whereby a person contracts to enter a status relationship, such as indentured servitude or marriage under the coverture system. See 2 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 672 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978). Weber defined the

“status contract” as a form used “in the spheres of public and family” that is distinct from the “contracts propagated by the market society.” *Id.* The status contract was a “primitive contract[.]... [that] involve[d] a change in what may be called the total legal situation (the universal position) and the social status of the persons involved.” *Id.* Because the status contract “meant that the person would ‘become’ something different in quality (or status) from the quality he possessed before... [e]ach party must thus make a new ‘soul’ enter his body” through the ritual enactment of a magical rite. *Id.*

For a discussion of indentured servitude as existing between status and contract, see Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870*, at 56 (Thomas A. Green ed., 1991) (quoting Weber, *supra* note 26, at 672, 674) (“One unrelated person could become the legal dependent of another in this way because of the nature of the agreement between them. Max Weber called such agreements ‘status contracts.’ ‘By means of such a contract,’ he wrote, ‘a person was to become somebody’s child, father, wife, brother, master, slave, kin, comrade-in-arms, protector, client, follower, vassal, subject, friend, or quite generally comrade.’ These kind of agreements implicated ‘the total social status of the individual and... integrat[ed him] into an association comprehending his total personality. [They created an] all-inclusive [set of] rights and duties.’”).

27 For a different version of the critique of the status/contract distinction, see Siegel, *supra* note 15, at 1119. Rather than attacking the categories of status and contract, Siegel deconstructs the narrative which posits that status gives way and is overtaken by contract, arguing instead that contractual reforms actually entrench previous status relationships:

In short, the effort to disestablish the common law of marital status transformed its structure and translated its justifications into a more contemporary gender idiom--a reform dynamic I call “preservation-through-transformation.” As the case of marital status law illustrates, attempts to dismantle a status regime can discredit the rules and reasons employed to enforce status relations in a given historical era, and so create pressure for legislators and jurists to reform the contested body of law enough so that it can be differentiated from its contested predecessor. Assuming that something of value is at stake in such a struggle, it is highly unlikely that the regime that emerges from reform will redistribute material and dignitary “goods” in a manner that significantly disadvantages the beneficiaries of the prior, contested regime... In this way, the effort to disestablish a body of status law can produce changes that modernize its rule structure and justificatory rhetoric. These reforms may well improve the material and dignitary circumstances of subordinated groups, but they will also enhance the legal system’s capacity to justify regulation that perpetuates inequalities among status-differentiated groups.

Id.

28 For an example of this kind of thinking, see Ertman, *supra* note 23, at 365 (describing DOMA as “a move toward contractualism by increasingly tolerating people’s different choices in family formation, even if remnants of status remain in the federal definition of marriage”).

29 Halley, *Behind the Law*, *supra* note 18, at 3.

30 798 N.E.2d 941 (Mass. 2003).

31 *Id.* at 954, 995.

32 *Id.* at 954 (quoting *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 809 (Mass. 2002)).

33 *Id.* at 995 (Cordy, J., dissenting) (quoting Bishop, *supra* note 19, at § 32). By citing to Bishop, Cordy is implicitly referencing the status/contract distinction, which Bishop first introduced into American legal thought.

34 *Id.* at 954, 995.

35 *Id.* at 954 (quoting *French v. McAnarney*, 195 N.E. 714, 715 (Mass. 1935)).

36 See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 956-60 (N.D. Cal. 2010) (Facts 19-32). Rather than laying out the history as general background or dicta, Walker makes a point of dedicating a significant portion of his factual findings to creating an official record of the history of marriage in the United States. *Id.*

37 *Id.*

38 *Id.* at 957. Slavery is marked as a traditional status dyad (master/slave), and the transition from slavery to freedom can be viewed as movement from status to contract. As individuals newly initiated into the realm of contract, former slaves could enter the contractual

relation of marriage. For an insightful analysis that complicates this historical narrative, see Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* 35-55 (1998).

39 [Perry, 704 F. Supp. 2d at 958.](#)

40 *Id.*

41 *Id.*

42 *Id.* at 959.

43 *Id.* at 960 (Walker paraphrasing the testimony--which he has already found to be factually credible--of historian Nancy Cott).

44 *Id.* at 961 (Fact 35(b)).

45 [Perry, 704 F. Supp. 2d at 972.](#)

46 *Id.*

47 *Id.*

48 Halley recognizes the conceptual pull of describing marriage as status and domestic partnership as contract and criticizes this dichotomy. Halley, *Behind the Law*, *supra* note 18, at 23 ("The question of whether CU [civil union] is more like marriage or a business association--more like status or more like contract--has been rendered irretrievably ideological.").

49 [Perry, 704 F. Supp. 2d at 992.](#)

50 [Maynard v. Hill, 125 U.S. 190, 210-211 \(1888\)](#); see *supra* note 21 and accompanying text.

51 [Perry, 704 F. Supp. 2d at 993.](#)

52 *Id.*

53 *Id.*

54 *Id.* (quoting [Griswold v. Connecticut, 381 U.S. 479, 486 \(1965\)](#)).

55 There is no mention in the trial transcript of the specific law to which Herek is referring. Transcript of Proceedings at 2047-48, [Perry v. Schwarzenegger, 704 F. Supp. 2d 921 \(N.D. Cal. 2010\)](#) (No. C 09-2292-VRW), available at www.afer.org/wp-content/uploads/2010/01/Perry-Vol-9-1-22-10.pdf. Although Herek mentions a certain letter mailed by the California Secretary of State, that letter does not specify the law at issue. See Letter from Kevin Shelley, California Secretary of State, to all registered domestic partners, [Perry v. Schwarzenegger, 704 F. Supp. 2d 921 \(N.D. Cal. 2010\)](#) (No. C 09-2292-VRW), Exhibit No. PX2265, available at <https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/PX2265.pdf>. This letter was sent according to [Cal. Fam. Code § 299.3](#) (West 2004 & 2011 electronic update). In 2004, §§ 297-299.2 (dealing with various aspects of domestic partnerships) were updated, so the letter presumably refers to these changes as a whole.

56 [Perry, 704 F. Supp. 2d at 973-74.](#)

57 *Id.* at 974.

58 *Id.*

59 *Id.*

60 At least one couple was willing to terminate their marriage because of changes in the tax law. In *Druker v. Commissioner*, a husband and wife challenged the so-called marriage penalty which taxes dual-earning married couples at an unfavorable rate; after they lost the case, they divorced in order to take advantage of a lower tax bracket. See [Druker v. Comm'r, 697 F.2d 46 \(2d Cir. 1982\)](#).

61 Suzanne A. Kim, [Marital Naming/Naming Marriage: Language and Status in Family Law, 85 Ind. L.J. 893, 896 \(2010\)](#) ("There are at least two conceptions of status that circulate in family law, one which can be called legal status, and the other social status. Legal status

describes a position bearing a package of legal rights and obligations. Social status is a broader concept, referring to social positioning more generally. Implicit in the latter understanding of status are the concepts of recognition, relative privilege, and hierarchy.”).

62 [Goodridge v. Dept. of Pub. Health](#), 798 N.E.2d 941, 954 (Mass. 2003).

63 [Id.](#) at 954-55 (“Civil marriage is... a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.... [C]ivil marriage is an esteemed institution....”).

64 [In re Op. of the Justices to the Senate](#), 802 N.E.2d 565, 570 (Mass. 2004).

65 [Id.](#) at 571-72.

66 [Perry v. Schwarzenegger](#), 704 F. Supp. 2d 921, 970 (N.D. Cal. 2010).

67 [Id.](#)

68 [Id.](#) at 971.

69 [Id.](#) There are numerous other references to the social superiority of marriage in the decision. See also [id.](#) at 970 (“Some same-sex couples who might marry would not register as domestic partners because they see domestic partnership as a second class status.... Same-sex couples value the social recognition of marriage and believe that the alternative status conveys a message of inferiority.”); [id.](#) at 979-80 (“When gay men and lesbians have to explain why they are not married, they ‘have to explain, I’m really not seen as equal. I’m--my status is--is not respected by my state or by my country, by my fellow citizens.’”); [id.](#) at 980 (“Badgett’s interviews with same-sex couples indicate that couples value the social recognition of marriage and believe that the alternative status conveys a message of inferiority.”); [id.](#) at 994 (same-sex relationships are viewed as “of lesser stature than the comparable relationships of opposite-sex couples”) (quoting [In re Marriage Cases](#), 183 P.3d 384, 402 (Cal. 2008)).

70 See Maine, [supra](#) note 11; see also [supra](#) note 12 and accompanying text.

71 Blackstone, [supra](#) note 7.

72 While this does not fit well with our modern conception of husband and wife, at the time of Blackstone, “[a] single figure was assumed to serve as husband, father, and master. He was not one but three legal persons. The wife, the child, and the servant were not just subordinate, they were similarly subordinate.” Halley, [What is Family Law?](#), [supra](#) note 6, at 2.

73 Kim, [supra](#) note 61, at 898 (“This understanding [of status] more broadly relates to social positioning. Implicit in status writ large are the notions of social recognition, relative privilege, and position in hierarchy. In other words, this broader concept of status pertains to power, either in its existence or its absence. When we discuss the relative power of social groups or of individuals, we often refer to their ‘statuses.’”).

74 Oxford English Dictionary, “status” definition 2(a) (online ed. Mar. 2011), available at <http://www.oed.com.ezp-prod1.hul.harvard.edu/viewdictionaryentry/Entry/189355>. Most of the usage examples following this definition are taken from the 19th century, the era in which the status/contract distinction was most popular.

75 [Id.](#), “status” definition 3(a). Again, the usage examples are taken from 19th century texts.

76 See Halley, [Behind the Law](#), [supra](#) note 18, at 28-32.

77 [Id.](#) Halley also explains that in traditional status dyads, there is a body of law for each half of the dyad. For example, there is a body of law dealing with kings and a body of law dealing with commoners. While there is a body of law specifically directed at married people, Halley posits that there is no such body of law for single individuals. [Id.](#) (While almost all laws could be said to apply to single individuals, to call such laws the laws of “singleness” would be a gross misrepresentation.) Because there are no laws of singleness, Halley argues, “single” cannot properly exist in a classical status dyad. [Id.](#) Interestingly, there is a discrete body of law for domestic partnerships, which would seem to imply that domestic partnerships could fit into half of a status dyad.

78 Kim, [supra](#) note 61, at 894.

- 79 Id. at 902. “Recent case law on same-sex marriage” assumes that “relational names are status themselves,” and this assumption serves to imbue those names with status attributes. Id.(emphasis added).
- 80 Id.
- 81 Id.
- 82 *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010) (quoting M.V. Lee Badgett, When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage 58-59 (2009)).
- 83 Id.
- 84 *Maynard v. Hill*, 125 U.S. 190, 211-12 (1888) (“It [marriage] is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.”).
- 85 It was uncontested that “[t]he freedom to marry is recognized as a fundamental right protected by the Due Process Clause.” *Perry*, 704 F. Supp. 2d at 991.
- 86 Walker framed the question as follows: “Having determined that plaintiffs seek to exercise their fundamental right to marry under the Due Process Clause, the court must consider whether the availability of Registered Domestic Partnerships fulfills California’s due process obligation to same-sex couples.” Id. at 993.
- 87 While California law states that domestic partners have the same legal rights and obligations as married couples, the institutions are not true legal equivalents because federal law creates distinctions that favor marriage. *Cal. Fam. Code* § 297.5(a) (West 2004) (“Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”); see Defense of Marriage Act (DOMA), *Pub. L. No. 104-199*, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)). As Walker describes it, “California has created two separate and parallel institutions to provide couples with essentially the same rights and obligations.” *Perry*, 704 F. Supp. 2d at 994.
- 88 *Perry*, 704 F. Supp. 2d at 994.
- 89 Id.
- 90 Id.
- 91 One could question whether the superiority/inferiority analysis fits well under a due process framework. A dignitary analysis would address many of these same problems of differentiating the two institutions (marriage and domestic partnership) while also assessing the dignitary harm the plaintiffs felt at being denied entrance into the institution of marriage. See id. at 994 (quoting *In re Marriage Cases*, 183 P.3d 384, 434 (Cal. 2008)) (“One of the ‘core elements of th[e] fundamental right [to marry] is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships.”).
- 92 10 U.S.C. § 654 (2006), repealed by *Pub. L. 111-321*, §2(f)(1)(A), Dec. 22, 2011, 124 Stat. 3516.
- 93 Halley asserts that it is a common misconception that Don’t Ask, Don’t Tell “sanctions servicemembers not for ‘who they are’ but for ‘what they do.’” Janet Halley, Don’t: A Reader’s Guide to the Military’s Anti-Gay Policy 1 (1999) [hereinafter Halley, Don’t]. A discussion of whether Don’t Ask, Don’t Tell actually punished status or conduct is beyond the scope of this paper. It is enough to say that this dichotomy has been widely used in discussions of this military policy. While I will refer to the status/conduct dyad, this pair is not a true dyad because the two terms overlap in the context of homosexual identity. As Halley notes, the statement, “I am gay” is a performative act and can thus be classified as both status and conduct. Id. at 55.
- 94 *Perry*, 704 F. Supp. 2d at 996.

- 95 [Christian Legal Soc'y v. Martinez](#), 561 U.S.--, 130 S.Ct. 2971 (2010).
- 96 [Perry](#), 704 F. Supp. 2d at 996 (quoting [Christian Legal Soc'y](#), 130 S.Ct. at 2990).
- 97 *Id.* at 964.
- 98 *Id.*
- 99 Walker cites to a study that showed that 90% of people are “consistently heterosexual” and 1-2% are “consistently lesbian, gay or bisexual.” *Id.*
- 100 *Id.*
- 101 *Id.*
- 102 See, e.g., [Perry](#), 704 F. Supp. 2d at 966 (“Perry is a lesbian and feels that she was born with her sexual orientation. At 45 years old, she does not think that it might somehow change.”); [id.](#) at 967 (“Zarrillo has been gay ‘as long as [he] can remember.’”); *id.* (“Katami has been a ‘natural-born gay’ ‘as long as he can remember.’”); *id.* (Ryan Kendall testified, “I knew I was gay just like I knew I’m short and I’m half Hispanic. And I just never thought that those facts would change.”).
- 103 Psychologist Gregory Herek testified, “[I]f I were a betting person, I would say that you would do well to bet that [a person’s] future sexual behavior will correspond to [his or her] current identity.” *Id.* at 964.
- 104 Janet Halley, [Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability](#), 46 *Stan. L. Rev.* 503, 516 (1994) [hereinafter Halley, *Sexual Orientation*].
- 105 Status (identity) is viewed as an unchangeable characteristic, just as (legal) status was viewed as an unchangeable set of rights and obligations. There is a similar immutable quality to both forms of status. As illustration of this point, Martha Ertman’s description of status could apply just as well to status as identity or legal status: “[s]tatus is constructed to deny its social construction, claiming instead to derive its substantive rules from an extra-human source of authority--usually God, nature, or biology--rather than human beings.” Ertman, *supra* note 23, at 338.
- 106 “[S]trong essentialism” is the “attribution of such a characteristic that is also natural or biological.” Halley, *Sexual Orientation*, *supra* note 104, at 548.
- 107 [Perry](#), 704 F. Supp. 2d at 966. To say that an individual can never change sexual orientation is to contradict constructivist theory. While constructivists do not necessarily argue that a person can change sexual orientation at will, they stand by the basic proposition that sexual orientation is created by and responds to outside influences. To deny the possibility of change is to deny the possibility of sexuality as a constructed concept.
- 108 *Id.* at 965. When asked if sexual orientation was a “socially constructed classification,” Herek replied, “[Social constructionists] are talking about the construction of [sexual orientation] at the cultural level, in the same way that we have cultural constructions of race and ethnicity and social class.... But to say that there’s no such thing as class or race or ethnicity or sexual orientation is to, I think, minimize the importance of that construction.” *Id.* While Herek’s answer is rather circular, I take him to mean that the category of sexual orientation in itself is too important to trivialize as a mere cultural construction. Instead, there is a value to be found in the inherent category of sexual orientation that is lost if it is viewed as constructed.
- 109 As Suzanne Goldberg notes in the context of gay rights litigation, “I feared the Court might seize on the social construction argument and find the category of ‘gays and lesbians’ too diffuse to amount to a cognizable class.” Suzanne B. Goldberg, *Social Justice Movements and LatCrit Community: On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 *Or. L. Rev.* 629, 631 (2002). The impetus to describe queer individuals as a discrete group with immutable characteristics comes from two strands in equal protection law: [United States v. Carolene Prods. Co.](#), 304 U.S. 144, 152 n.4 (1938) (suggesting that “more searching judicial inquiry” should be applied to legislation that discriminates against “discrete and insular minorities”) and [Frontiero v. Richardson](#), 411 U.S. 677, 686 (1973) (subjecting discrimination based on sex to strict scrutiny because, among other factors, “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”). As Halley argues, the need to show immutability is generally overstated, as *Frontiero* describes immutability as “not a requirement but a factor” for application of strict scrutiny. Halley, *Sexual Orientation*, *supra* note 104, at 507. Also, although *Frontiero* uses the language of “strict judicial scrutiny,”

the plurality decision has been criticized for overstating the test applied to classifications based on sex (which are usually evaluated under intermediate scrutiny). 411 U.S. at 688; see Rosalie Berger Levinson, [Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci](#), 34 Harv. J.L. & Gender 1, 8 (“[I]n 1976, the Supreme Court officially rejected the race analogy and settled on a less rigorous standard for assessing claims of gender bias. The Court held in *Craig v. Boren* [429 U.S. 190 (1976)] that gender classifications would be subject to intermediate, not strict, scrutiny.”).

110 Goldberg, *supra* note 109, at 636.

111 [Perry](#), 704 F. Supp. 2d at 964. Walker, however, was unpersuaded, and he found that “[s]exual orientation is... a distinguishing characteristic that defines gays and lesbians as a discrete group.” *Id.*

112 *Id.*

113 But see Halley, *Sexual Orientation*, *supra* note 104, at 517 (discussing the ways in which both essentialism and constructivism can be militated to work for both pro- and anti-gay arguments).

114 *Id.* at 511 (“[E]qual protection law about sexual orientation began to focus on the identity or status of homosexuals--an issue that the pro-gay argument from immutability seems tailored to illuminate.”). Halley goes on to critique the presumed necessity of adopting an essentialist, immutability stance when litigating equal protection cases. *Id.* at 511-13.

115 Goldberg, *supra* note 109, at 635.

116 *Id.*

117 See, e.g., Halley, *Sexual Orientation*, *supra* note 104, at 505 (“Many gay men, lesbians, bisexuals, and queers reject the view that they constitute a minority distinguished by a stable, natural identity.”).

118 Goldberg, *supra* note 109, at 632.

119 For an example of the difficulty in defining queer individuals as a suspect or quasi-suspect class, see [Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati](#), 128 F.3d 289, 292-93 (6th Cir. 1997). There, the court refused to define homosexuals as a class based on conduct because, under *Bowers*, homosexuality was still “constitutionally proscribable.” *Id.* at 293 (citing [Bowers v. Hardwick](#), 478 U.S. 186 (1986)). The court “further observed that any attempted identification of homosexuals by non-behavioral attributes could have no meaning, because the law could not successfully categorize persons ‘by subjective and unapparent characteristics such as innate desires, drives, and thoughts.’” *Id.* (quoting [Equal. Found. I](#), 54 F.3d 261, 267 (6th Cir. 1995)).

120 Halley, *Don't*, *supra* note 93, at 13-14. It is unclear if this dichotomy still holds post-*Lawrence*. [Lawrence v. Texas](#), 539 U.S. 558 (2003). While homosexual conduct as such is no longer illegal, there is still a sense that defining sexual orientation by conduct does not produce a compelling group for equal protection litigation purposes.

121 Halley, *Don't*, *supra* note 93, at 30.

122 704 F. Supp. 2d 921 (N.D. Cal. 2010).

123 This broader public use of status is evidenced by the testimony of the plaintiffs, who draw on concepts of status to describe their relationships.

124 See Jeffrey Kosbie, Note, [Misconstructing Sexuality in Same-Sex Marriage Jurisprudence](#), 6 Nw. J.L. & Soc. Pol'y 238, 240 (2011) (arguing “that courts’ discussions of sexuality draw on and reflect underlying cultural assumptions about sexuality” and that “[t]he way these assumptions are legitimized may be more important than the actual legal decisions in the cases”).